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UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

11 Grand Canyon Ranch, LLC, an Arizona
12 limited liability company, f.k.a. Grand
Canyon West Ranch, LLC.

13 Plaintiff.

V.

18 Defendants.

Case No. 3:03-cv-02496-NVW

PLAINTIFF'S RESPONSE TO DEFENDANTS' MOTION TO DISMISS

20 Plaintiff Grand Canyon Ranch, LLC, formerly known as Grand Canyon West
21 Ranch, LLC (“Grand Canyon Ranch”), opposes the United States’ motion to dismiss
22 (ECF Doc. 208). The United States entered into a settlement agreement (“Agreement”)
23 with Grand Canyon Ranch to terminate prior litigation proceedings over which this Court
24 indisputably had jurisdiction, agreed that the Court would retain jurisdiction to enforce the
25 Agreement, accepted the benefits of the Agreement from Grand Canyon Ranch, but
26 intentionally breached its express and implied obligations owed to Grand Canyon Ranch

1 under the Agreement. Despite the foregoing facts, the United States argues that this Court
 2 cannot exercise either its inherent powers or jurisdiction – ancillary, retained, or otherwise
 3 – to enforce the Agreement that the parties agreed the Court would have jurisdiction to
 4 enforce. The United States further argues that the Court cannot award Grand Canyon
 5 Ranch any meaningful relief for the United States' material breaches of the Agreement.
 6 The United States is wrong.

7 The United States' arguments regarding specific performance and damage
 8 limitations fail based on the plain language of the Agreement, and for the reasons the
 9 Court articulated at the evidentiary hearing held on September 25 and 26, 2013 and in its
 10 orders granting injunctive relief to Grand Canyon Ranch. Even if the Court could not
 11 compel specific performance of the Agreement, however, the Court has other avenues
 12 through which it may fashion appropriate relief in Grand Canyon Ranch's favor. The
 13 Court, for example, could find that the United States' material breaches of the Agreement
 14 excuse Grand Canyon Ranch from further performance, which would mean that the
 15 United States and its grantees and assigns no longer have any rights to use the easement
 16 that Grand Canyon Ranch granted under the Agreement. The Court could also hold the
 17 United States in contempt for violating the Court's dismissal order that incorporates the
 18 Agreement, and impose fines or other sanctions for each day the United States has and
 19 continues to operate in violation of the Court's order and the Agreement. The Court may
 20 further award Grand Canyon Ranch substantial damages to compensate it for the loss of
 21 its bargain under the Agreement. Such damages would include not only the physical
 22 damage caused to Grand Canyon Ranch's property and damage to its business, but also
 23 the exponentially higher cost of retrofitting the road to provide for the amenities required
 24 under the Agreement, which the United States still refuses to build.

25 The United States' arguments regarding tort claims and violations of Arizona law
 26 fail because, as of this date, Grand Canyon Ranch has not sued the United States in tort or

1 for any violations of Arizona law. Grand Canyon Ranch's claims against the United
 2 States for breach of contract, declaratory relief, and injunctive relief all arise out of the
 3 United States' material breaches of the parties' Agreement. The factual allegations the
 4 United States complains about are not separate claims, but merely highlight the United
 5 States' failure to comply with the express terms of the parties' Agreement and the implied
 6 covenant of good faith and fair dealing contained therein, including the United States'
 7 failure to exercise proper (or any) controls over those with whom it chose to separately
 8 contract (i.e., the Hualapai Tribe). Finally, the Hualapai Tribe ("Tribe") is not an
 9 indispensable party to this action because it is not a party to the Agreement out of which
 10 all of Grand Canyon Ranch's claims arise. Grand Canyon Ranch has no contractual or
 11 other relationship with the Tribe, and the Tribe has made it clear it intends to hide behind
 12 sovereign immunity rather than subject itself to the Court's jurisdiction and answer for its
 13 outrageous conduct. As suggested above and discussed in further detail below, the Court
 14 may fashion complete relief for Grand Canyon Ranch without the Tribe's involvement.
 15 The Court should therefore deny the United States' motion to dismiss in its entirety.

16 **I. FACTUAL BACKGROUND.**

17 **A. The Parties Entered Into the Agreement to Settle and Terminate This**
 18 **Lawsuit, and Agreed the Court Would Enforce the Agreement.**

19 On June 27, 2007, Grand Canyon Ranch entered into the binding settlement
 20 Agreement with the United States and Mohave County. *See, e.g.*, Second Amended
 21 Complaint (ECF Doc. 195) at ¶ 31; *see also* Agreement (ECF Doc. 118-6 at page 12);
 22 Order dated Oct. 11, 2013 (ECF Doc. 254) at 2:26 – 3:8. The Agreement terminated prior
 23 litigation proceedings then pending before this Court in the above-captioned matter. ECF
 24 Doc. 118-6 at page 13 ¶ 3. The Court indisputably had jurisdiction over the prior
 25 proceedings that led to the settlement documented in the Agreement, and if the parties had
 26 not entered into the Agreement, those proceedings would have continued before this Court

1 until the Court entered a final judgment. As part of the Agreement, then, the parties
 2 expressly agreed that the Court would have jurisdiction to enforce its terms:

3 Any action relating to this Agreement in any way shall be brought and
 4 maintained in the state or federal courts in the State of Arizona, and all
5 parties consent to jurisdiction and venue in said courts. The parties agree
 6 that any dispute as to performance of this agreement may be resolved by
 proceeding by motion in the United States District Court for the District of
 Arizona, under the caption and case number of the Action.

7 ECF Doc. 118-6 at page 15 ¶ 12 (emphasis added); *see also* Second Amended Complaint
 8 (ECF Doc. 195) at ¶ 44. Each of the parties to the Agreement specifically warranted “that
 9 it has the authority to enter into this Agreement, and that it will take such acts as may be
 10 required to effectuate this Agreement.” ECF Doc. 118-6 at page 15 ¶ 14. The Tribe was
 11 not a party to the original litigation before this Court, is not a party to the Agreement, and
 12 the road construction at issue in this case is occurring on Grand Canyon Ranch’s private
 13 property and not on the Tribe’s property. *See generally id.* at pages 10 – 19; *see also*
 14 Order dated Oct. 11, 2013 (ECF Doc. 254) at 3:28 – 4:2.

15 **B. The United States Materially Breached the Agreement.**

16 The United States has materially breached the express and implied covenants in the
 17 Agreement in multiple ways, which breaches have caused Grand Canyon Ranch
 18 substantial damage. *See, e.g.*, Second Amended Complaint (ECF Doc. 195) at ¶¶ 55 –
 19 134; *see also* Order dated Oct. 11, 2013 (ECF Doc. 254) at 5:24 – 7:27, 9:1-14, 9:25 –
 20 10:6, and 10:12-14; Temporary Restraining Order (ECF Doc. 255) at 1:20 – 2:6. As the
 21 Court succinctly stated: “Defendants have failed in their obligations to honor the
 22 Settlement Agreement and to ensure construction proceeds in a way that protects the
 23 rights of the easement grantor [Grand Canyon Ranch].” Order dated Oct. 11, 2013 (ECF
 24 Doc. 254) at 10:3-5. For that precise reason, Grand Canyon Ranch sued the United States
 25 for breach of the Agreement (Second Amended Complaint at ¶¶ 165 – 173), declaratory
 26 relief under the Agreement (*id.* at ¶¶ 174 – 179), and injunctive relief to preclude

1 continuing violations of the Agreement (*id.* at ¶¶ 180 – 186). As of this date, Grand
 2 Canyon Ranch has not asserted any tort claims against the United States. *See generally*
 3 Second Amended Complaint (ECF Doc. 195).

4 **C. The Court Already Ruled It Has Jurisdiction to Enforce the Agreement.**

5 The Court previously amended the July 2, 2007 dismissal order terminating the
 6 prior litigation proceedings to provide this Court with “continuing jurisdiction to enforce
 7 the settlement [Agreement] underlying that dismissal order.” ECF Doc. 162 at 11:12-14.
 8 In addition, at the evidentiary hearing on Grand Canyon Ranch’s recent application for
 9 preliminary injunction, the Court acknowledged that it generally “cannot order specific
 10 performance of a contract” as to the United States, but “in this case, we have the
 11 circumstances that this is a settlement that expressly agreed that the Court would retain
 12 jurisdiction to do exactly that.” Transcript of Proceedings (Sept. 26, 2013) at 377:11-16.
 13 The Court also stated that the Agreement’s “terms are utterly explicit, and it includes the
 14 obligation to comply and the authority of this Court to enforce it.” *Id.* at 413:21-23; *see*
 15 *also* Order dated Oct. 11, 2013 (ECF Doc. 254) at 3:7-8 (“The parties agreed that the
 16 United States District Court for the District of Arizona would retain jurisdiction to enforce
 17 the settlement”).

18 The Court further stated that, even if it could not order specific performance by
 19 telling the United States what to do as part of its construction, it could still order the
 20 United States to not do something such as not continue using the Grant of Right-of-Way
 21 (“ROW”) on Grand Canyon Ranch’s property if the United States continues to plow
 22 forward in a manner that exceeds the scope of the ROW and otherwise violates the United
 23 States’ obligations under the Agreement. *See, e.g.*, Transcript of Proceedings (Sept. 26,
 24 2013) at 414:5-23. As the Court noted, the United States cannot decide it will only accept
 25 the part of the ROW it likes and violate the remaining part it does not like so as to
 26 completely deprive Grand Canyon Ranch of the benefit of its bargain under the

1 Agreement. *Id.* In such a case, the Court properly stated it could find that the United
 2 States has simply lost all rights to use the ROW: “You don’t have an easement. Stop.”
 3 *Id.* The Court also correctly found that Grand Canyon Ranch never would have entered
 4 into the Agreement or granted the ROW to the United States in the absence of the Court’s
 5 retained jurisdiction and authority to enforce the terms of the Agreement. *Id.* at 413:14-
 6 20; *see also* Nigel Turner’s testimony in Transcript of Proceedings (Sept. 25, 2013) at
 7 67:1 – 69:2.

8 **II. THE COURT SHOULD DENY THE MOTION TO DISMISS.**

9 **A. The Applicable Standards.**

10 On a factual challenge to the Court’s subject matter jurisdiction under Rule
 11 12(b)(1), the Court is not required to but “may look beyond the complaint to matters of
 12 public record without having to convert the motion into one for summary judgment.”
 13 *White v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000). The Court “need not” accept Grand
 14 Canyon Ranch’s factual allegations as true. *Id.* On any potential appeal, however, “the
 15 reviewing court must accept as true the allegations of the complaint.” *United States v.*
 16 *Hughes Aircraft Co.*, 243 F.3d 1181, 1189 (9th Cir. 2001); *see also* *Savage v. Glendale*
 17 *Union High School*, 343 F.3d 1036, 1039 n.1 (9th Cir. 2003) (noting that “because this
 18 case was considered by the district court under a Rule 12(b)(1) motion to dismiss, we
 19 assume the material facts alleged in the complaint are true.”). With respect to a motion to
 20 dismiss for failure to join an indispensable party, however, the moving party “bear[s] the
 21 burden in producing evidence in support of the motion.” *Village of Hotvela Traditional*
 22 *Elders v. Indian Health Services*, 1 F.Supp.2d 1022, 1025 (D. Ariz. 1997).

23 **B. The United States’ Request to Dismiss the Injunctive Relief Claim is Moot.**

24 The United States seeks dismissal of Grand Canyon Ranch’s claim for injunctive
 25 relief based on the United States’ prior motion to dismiss. Motion (ECF Doc. 208) at
 26 3:12-20 (citing ECF Doc. 131). Grand Canyon Ranch incorporates by reference its

1 response to the United States' prior motion to dismiss. *See* ECF Doc. 137. In any event,
 2 the United States' request is largely rendered moot in light of the Court's recent rulings
 3 granting injunctive relief in Grand Canyon Ranch's favor. *See, e.g.*, Temporary
 4 Restraining Order (ECF Doc. 255); *see also* Transcript of Proceedings (Sept. 26, 2013) at
 5 450:16-24 and 454:11 – 456:5; Order dated Oct. 11, 2013 (ECF Doc. 254). To the extent
 6 the request to dismiss the injunctive relief claim is not moot, however, the Court should
 7 deny the United States' motion for the reasons set forth below.

8 **C. The Court Properly Retained Jurisdiction to Enforce the Agreement.**

9 The United States argues that the Court cannot order specific performance, and
 10 only has jurisdiction to hear contract actions against the United States involving \$10,000
 11 or less in damages. Motion (ECF Doc. 208) at 3:12 – 5:7. The United States completely
 12 ignores that it voluntarily entered into an Agreement expressly vesting this Court with
 13 jurisdiction to enforce the terms of the parties' settlement. ECF Doc. 118-6 at page 15
 14 ¶ 12. The United States also ignores that it warranted to Grand Canyon Ranch "that it has
 15 the authority to enter into this Agreement, and that it will take such acts as may be
 16 required to effectuate this Agreement." *Id.* at ¶ 14. As the Court has repeatedly noted,
 17 these distinguishing factors take this case out of the ordinary situation where the Court
 18 would arguably lack jurisdiction to enforce the terms of a contract entered into with the
 19 United States. *See, e.g.*, ECF Doc. 162 at 11:12-14; Transcript of Proceedings (Sept. 26,
 20 2013) at 377:11-16 and 413:21-23.

21 In fact, the Court expressly amended its prior dismissal order in this matter to
 22 retain jurisdiction over the enforcement of the Agreement. ECF Doc. 162 at 11:12-14.
 23 The Court thus has jurisdiction and inherent power to enforce the Agreement. *See*
 24 *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 381 (1994) ("we think the court is
 25 authorized to embody the settlement contract in its dismissal order (or, what has the same
 26 effect, retain jurisdiction over the settlement contract."); *Dacanay v. Mendoza*, 573 F.2d

1 1075, 1078 (9th Cir. 1978) (“it is equally well settled in the usual litigation context that
 2 courts have inherent power summarily to enforce a settlement agreement with respect to
 3 an action pending before it . . . [based in part on] the policy favoring the amicable
 4 adjustment of disputes and the concomitant avoidance of costly and time consuming
 5 litigation.”); *TNT Mktg., Inc. v. Agresti*, 796 F.2d 276, 278 (9th Cir. 1986) (“Although the
 6 court normally exercises its enforcement power in response to a motion to enforce the
 7 agreement, it may do so in contempt proceedings for violation of a court order approving
 8 the settlement and commanding or enjoining particular conduct.”); *In re Suchy*, 786 F.2d
 9 900, 902 (9th Cir. 1986) (“it is well settled that a court has inherent power to enforce
 10 summarily a settlement agreement involving an action pending before it.”); *Aro Corp. v.
 11 Allied Witan Co.*, 531 F.2d 1368, 1371 (6th Cir. 1976), *cert. denied* by 429 U.S. 862
 12 (1976) (“It is well established that courts retain the inherent power to enforce agreements
 13 entered into in settlement of litigation pending before them,” because “[t]he agreement in
 14 question came into existence not in the free market place but in response to pending
 15 litigation in a federal court,” and “the contract entered into between the parties cannot be
 16 viewed independently of the original suit.”); *VanLeeuwen v. Farm Credit Admin.*, 600
 17 F.Supp. 1161, 1164 (D. Or. 1984) (“Upon repudiation of a settlement agreement which
 18 terminates litigation pending before it, a district court has authority under Fed.R.Civ.P.
 19 60(b)(6) to vacate the prior dismissal order and restore the case to its docket,” after which
 20 “the court can enforce the original agreement if it has been the basis for dismissal and
 21 incorporated into the court’s order or the case can proceed to a trial on the merits.”).

22 In *Kokkonen*, for instance, the U.S. Supreme Court rejected the argument that the
 23 district court had ancillary jurisdiction to enforce a settlement agreement where the prior
 24 dismissal order did not incorporate the settlement agreement. 511 U.S. at 381. The Court,
 25 however, noted that “[t]he situation would be quite different if the parties’ obligation to
 26 comply with the terms of the settlement agreement had been made part of the order of

1 dismissal. In that event, a breach of the agreement would be a violation of the order, and
 2 ancillary jurisdiction to enforce the agreement would therefore exist.” *Id.* (emphasis
 3 added). Retaining jurisdiction over the settlement agreement has the same effect as
 4 incorporating it into the dismissal order. *Id.*

5 In this case, the Court has amended the dismissal order to provide for its
 6 enforcement of the Agreement as the parties originally intended, and the Court therefore
 7 has jurisdiction to enforce the terms of the Agreement. Accepting the United States’
 8 position would effectively make the Agreement unenforceable anywhere contrary to the
 9 parties’ intent that this Court enforce it. The United States’ position would also render
 10 meaningless the Court’s prior ruling retaining jurisdiction over the Agreement.

11 Stated differently, the Court indisputably had jurisdiction over the original
 12 proceedings between the parties in this lawsuit, which started in 2003 and terminated with
 13 the settlement documented in the Agreement. Grand Canyon Ranch never would have
 14 settled and entered into the Agreement without the United States’ express covenant that
 15 the Court would have jurisdiction to enforce the terms of the Agreement that terminated
 16 the litigation. Transcript of Proceedings (Sept. 26, 2013) at 413:14-20; *see also* Transcript
 17 of Proceedings (Sept. 25, 2013) at 67:1 – 69:2. Absent the settlement as documented in
 18 the Agreement, the prior litigation would not have terminated and Grand Canyon Ranch
 19 would have continued to pursue its claims against the United States until it obtained a
 20 final, enforceable judgment against the United States, which the Court certainly had
 21 jurisdiction to issue. In lieu of litigating to a final judgment, the parties agreed to settle
 22 their disputes under the terms of the Agreement, and further agreed that the Court would
 23 have jurisdiction to enforce the Agreement. The fact the United States decided to renege
 24 on its contractual obligations several years later does not operate to divest the Court of its
 25 original jurisdiction to enter judgment against the United States and enforce the settlement
 26 documented in the Agreement, which arose out of a lawsuit that had been properly

1 initiated before the Court.

2 Accordingly, the Court should enforce the Agreement just like any other contract.
 3 “An agreement to settle a legal dispute is a contract and its enforceability is governed by
 4 familiar principles of contract law.” *Jeff D. v. Andrus*, 899 F.2d 753, 759 (9th Cir. 1990).
 5 The law favors enforcement of settlement agreements to, among other things, avoid costly
 6 and time consuming litigation. *Id.* The Court may specifically enforce a settlement
 7 agreement, or award damages for its breach. *TNT Mktg.*, 796 F.2d at 278.

8 In addition, the United States Supreme Court has recognized that “a repudiation of
 9 a contract, amounting to a breach, warrants the other party in going no further in
 10 performance on his side.” *The Eliza Lines*, 199 U.S. 119, 128 (1905); *see also Zancanaro*
 11 *v. Cross*, 85 Ariz. 394, 400, 339 P.2d 746, 750 (1959) (“the victim of a material or total
 12 breach is excused from further performance.”). Thus, even if the Court agreed with the
 13 United States that it lacked authority to enforce the Agreement despite retaining
 14 jurisdiction for that purpose, the Court could still find that the United States has materially
 15 breached the Agreement and excuse Grand Canyon Ranch from further performance. In
 16 other words, as the Court suggested at the evidentiary hearing, the Court could properly
 17 find that the United States no longer has any rights to use the ROW and terminate the
 18 easement over Grand Canyon Ranch’s private property. Transcript of Proceedings (Sept.
 19 26, 2013) at 414:5-23; *Eliza Lines*, 199 U.S. at 128; *Zancanaro*, 85 Ariz. at 400, 339 P.2d
 20 at 750.

21 **D. Grand Canyon Ranch Has Not Sued the United States in Tort or For
 22 Violations of Arizona Statutes.**

23 The United States argues that the Court must dismiss certain of Grand Canyon
 24 Ranch’s allegations in its Second Amended Complaint related to violations of Arizona
 25 law (Motion at 5:8 – 6:15) and tortious conduct (Motion at 6:16 – 8:27). The Second
 26 Amended Complaint, however, only included claims against the United States for breach

1 of contract, declaratory relief, and injunctive relief. ECF Doc. 195 at ¶¶ 165 – 186. In
 2 this case, as of this date, Grand Canyon Ranch has not sued the United States for
 3 violations of any Arizona statutes or under any tort theories. *Id.*

4 The factual allegations about which the United States has complained are not
 5 separate tort claims, but merely demonstrate that the United States has not complied with
 6 the express and implied covenants in the Agreement, and instead improperly entrusted its
 7 obligations to the Tribe without adequate (or any) oversight or supervision. *See, e.g.,*
 8 Second Amended Complaint at ¶¶ 63, 64, 65, 67, 68, 71, 72, 74, and 85. Testimony at the
 9 evidentiary hearing established the truth of Grand Canyon Ranch’s allegations in this
 10 regard; for example, the contractor building the road on Grand Canyon Ranch’s property
 11 never even received a copy of the Final Environmental Impact Statement that the parties
 12 had incorporated into the Agreement as a material part of its terms. Transcript of
 13 Proceedings (Sept. 26, 2013) at 345:10-13; *see also* Agreement (ECF Doc. 118-6) at page
 14 ¶ 4, page 15 ¶ 8, page 19 ¶ 1; Second Amended Complaint at ¶¶ 56 – 63. The Court
 15 has also agreed that “[t]he United States cannot abdicate its responsibility for its easement
 16 or its obligations under the Settlement Agreement by delegating the construction of the
 17 road to the Hualapai Indian Tribe.” Order dated Oct. 11, 2013 (ECF Doc. 254) at 9:26 –
 18 10:1. The allegations at issue in the Second Amended Complaint only highlight the
 19 Tribe’s and Fann’s outrageous treatment of Grand Canyon Ranch and its managing
 20 member, and the egregious breaches of the peace and damage to Grand Canyon Ranch’s
 21 private property wrought because the United States has failed to comply with its
 22 obligations under the Agreement. *See, e.g.,* Second Amended Complaint at ¶¶ 63, 64, and
 23 143 – 164. The United States cannot obtain dismissal of these factual allegations at this
 24 stage of the proceedings. Further, some of the allegations that the United States argues do
 25 not apply to it included parallel citations to Arizona state law to supplement Grand
 26 Canyon Ranch’s citation of their counterparts under applicable federal law. *See, e.g.,*

1 Second Amended Complaint at ¶¶ 142, 173, 177, 178, and 186. The Court should not
 2 dismiss any such allegations from the Second Amended Complaint.

3 **E. The Tribe Is Not Indispensable to Any of Grand Canyon Ranch's Claims.**

4 The United States argues that the Tribe is an indispensable party, and the Court
 5 should dismiss the Second Amended Complaint under Fed. R. Civ. P. 12(b)(7) for "failure
 6 to join a party under Rule 19." Motion (ECF Doc. 208) at 9:1 – 15:2. The United States
 7 bears the burden on this motion. *Village of Hotvela*, 1 F.Supp.2d at 1025. Under Fed. R.
 8 Civ. P. 19, a party must be joined if it "is subject to service of process" and "joinder will
 9 not deprive the court of subject-matter jurisdiction," but only if the Court "cannot accord
 10 complete relief among existing parties" or "disposing of the action in the person's absence
 11 may" impair such person's ability to protect its interests or expose the person to a
 12 substantial risk of double, multiple, or inconsistent obligations. As previously stated,
 13 Grand Canyon Ranch would welcome the opportunity to join the Tribe to this lawsuit
 14 (ECF Docs. 212 and 246), and the Court has even indicated that the Tribe may move to
 15 intervene under Rule 24 if it chooses (ECF Doc. 249), but the Tribe has opted to continue
 16 hiding behind sovereign immunity.

17 Even if the Tribe waived sovereign immunity, however, the Tribe would not
 18 qualify as indispensable under Rule 19 because it is not a party to the Agreement out of
 19 which all of Grand Canyon Ranch's claims arise. The Tribe was neither a party to the
 20 original litigation in this case or the settlement documented in the Agreement. As such,
 21 the Court can accord Grand Canyon Ranch complete relief for the United States' material
 22 breaches of the Agreement in the absence of the Tribe. In fact, the United States admitted
 23 as much at the evidentiary hearing through the testimony of its regional roads engineer,
 24 David Smith:

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26

1 THE COURT: But do you understand that under the Settlement
2 Agreement all these obligations we're talking about are obligations of the
3 United States government. They cannot be punted off to someone else.

4 THE WITNESS: Correct.

5 THE COURT: And they must be carried out by the United States
6 government. Do you understand that?

7 THE WITNESS: Yes, sir.

8 Transcript of Proceedings (Sept. 26, 2013) at 227:5-12. The Court later stated that the
9 United States cannot delegate its obligations under the Agreement "to anybody and say,
10 we're washing our hands. You do what you want." *Id.* at 401:20 – 402:20. The Court
11 further elaborated:

12 This is a case about the obligations of the United States of America. The
13 United States of America can decide to give someone the right to carry out
14 the United States' obligations and it has no consequence on the obligations
15 of the United States. It's not freed from its obligations. It's not excused. It
16 doesn't get to wait until they can talk to someone else. The government is
17 obligated to do this. And if they ended up contracting with someone who
18 will not do the job, that is not the burden of the plaintiffs. That's the
19 government's. They have to accept responsibility for not having undertaken
to carry out their responsibility. They can deal with the people but the
injured plaintiff has no obligation to sue or bring in or wait for the
acquiescence of somebody else that is not the party with whom it contracted
or the holder of the property right that is the subject of this dispute.

20 *Id.* at 430:3 – 19 (emphasis added). Similarly, the Court later stated:

21 But it also is pretty clear here that the government, through the BIA, has
22 done business the way they usually do business with the tribe. They thought
23 they could just pass this to the tribe and whatever happened happened. I
24 believe the government's wrong about that. I understand why that's the
25 mindset of how the BIA operates 99.9 percent of the time, legitimately. But
26 this time, they couldn't. It looks like that's what happened, that they passed
it off to the tribe and they don't feel any obligation other than to act as a
facilitator to try to get the tribe to agree to honor the government's
obligations. And I don't have any difficulty concluding that they are off

1 base. The government has more than the opportunity of a facilitator. They
 2 are legally liable. They are responsible. And they do not free themselves of
their obligations by passing it off to the tribe or to the tribe's contractor.

3 *Id.* at 433:22 – 434:13 (emphasis added). The Court thereafter expressly ruled that “[t]he
 4 United States cannot abdicate its responsibility for its easement or its obligations under
 5 the Settlement Agreement by delegating the construction of the road to the Hualapai
 6 Indian Tribe.” Order dated Oct. 11, 2013 (ECF Doc. 254) at 9:26 – 10:1. Because the
 7 United States must comply with its obligations under the Agreement, and the Tribe is not
 8 a party to the Agreement, the Tribe is not indispensable to this case.

9 The primary case on which the United States relies is inapposite. Motion at p. 9
 10 (citing *Village of Hotvela*, 1 F.Supp.2d 1022). The *Village of Hotvela* case involved the
 11 Hopi Tribe’s construction of sewage treatment facilities located on tribal property using
 12 the federal government’s money but with the completed facilities to be owned by the
 13 Tribe. *Id.* at 1024-25. Plaintiff sought to enjoin the construction, and this Court found
 14 that the Tribe was an indispensable party. *Id.* at 1024, 1026. Absent joinder of the Hopi
 15 Tribe, “complete relief would not be accorded because the Hopi Tribe would remain free
 16 to continue construction with other funds.” *Id.* at 1026.

17 Here, in contrast, Grand Canyon Ranch sued and seeks relief based on the United
 18 States’ breaches of the Agreement. The Tribe is not a party to the Agreement.
 19 Furthermore, the public road construction at issue is not on tribal property, but is
 20 occurring on Grand Canyon Ranch’s property in and near the ROW that Grand Canyon
 21 Ranch granted to the United States. To the extent the Tribe has any rights to use the
 22 ROW, such rights are purely derivative as a grantee or assignee of the United States.
 23 Foreclosing the United States’ use of the ROW would necessarily foreclose use of the
 24 ROW by the United States’ grantees and assignees, including the Tribe. Further
 25 distinguishing this case from *Village of Hotvela*, the Tribe will not own the road upon its
 26

1 completion because it will be dedicated to Mohave County as a public road. Finally, as
 2 the Court may recall, the Tribe is represented by competent counsel and has full
 3 awareness of the proceedings in this case. Indeed, the Tribe and its counsel attended the
 4 recent evidentiary hearing, and lodged pre- and post-hearing amicus briefs with the Court.
 5 ECF Docs. 207 and 241. To the extent the Tribe has any interest in the road construction,
 6 it has already been invited to participate in these proceedings by intervention (*see, e.g.*,
 7 ECF Doc. 249), but the Tribe has elected to continue hiding behind its sovereign
 8 immunity rather than appear and answer for its outrageous conduct.

9 In short, the Tribe is neither a necessary nor proper party in this case. Grand
 10 Canyon Ranch entered into the Agreement with the United States and not the Tribe. The
 11 United States is the party that breached the Agreement and not the Tribe. The conduct at
 12 issue took place on Grand Canyon Ranch's private property and not on the Tribe's
 13 property. Whatever the United States may have separately agreed to with the Tribe does
 14 not impact Grand Canyon Ranch's claims against the United States for breach of the
 15 Agreement, and the Tribe is not indispensable to Grand Canyon Ranch's claims or the
 16 relief that the Court may grant against the United States.

17 **III. CONCLUSION.**

18 For these and the foregoing reasons, the Court should deny the United States'
 19 motion to dismiss (ECF Doc. 208) in its entirety.

20 DATED this 23rd day of October, 2013.

21 **MOYES SELLERS & HENDRICKS**

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23

/s/ Matt Lensch

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Keith L. Hendricks

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Louis D. Lopez

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Matthew A. Lensch

Attorneys for Plaintiffs

Grand Canyon Ranch, LLC,

f.k.a. Grand Canyon West Ranch, LLC

CERTIFICATE OF SERVICE

I hereby certify that, on October 23, 2013, I electronically transmitted Plaintiff's Response to Defendants' Motion to Dismiss to the Clerk of the Court using the CM/ECF System which will send notification of such filing and transmittal of a Notice of Electronic Filing to all CM/ECF registrants.

/s/ *LeeAnne Skumlien*